No. 78-163

In the Supreme Court of the United States

OCTOBER TERM, 1978

L. D. MCFARLAND COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23-31) is reported at 572 F. 2d 256. The decision and order of the National Labor Relations Board are reported at 219 N.L.R.B. 575 (Pet. App. 39-57).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1978 (Pet. App. 33-35). The petition

for a writ of certiorari was filed on July 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's finding that the union made an unconditional offer to waive initiation fees to all current employees in the unit.

2. Whether there was substantial evidence to support the Board's finding that the early closing of the polls had no effect on the representation election.

3. Whether the Board properly rejected petitioner's objections to the representation election without holding an evidentiary hearing and properly denied leave to relitigate a question in the unfair labor practice proceeding that was litigated in the representation proceeding.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 58-60.

STATEMENT

1. Pursuant to a representation petition filed by the Willamette Valley District Council, Lumber and Sawmill Workers Union ("the Union"), the Board conducted an election among petitioner's employees, which the Union won by a vote of 16 to 13 (Pet.

App. 41, 46).[1] Petitioner filed timely objections to the election alleging, *inter alia*: (1) that the Union had made an offer to waive initiation fees that amounted to a promise of monetary benefits to employees contingent on support for the Union; and (2) that the Board agent conducting the election had closed the polls early, precluding a potentially eligible employee from voting (Pet. App. 41).

After an administrative investigation, the Board's Regional Director found no impropriety in the Union's offer to waive initiation fees as set forth in a letter to employees, which stated in pertinent part (Pet. App. 22):

> THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT

The Regional Director also found that the former employee who arrived after the closing of the polls was not eligible to vote because he previously had been laid off without any prospect of rehiring (R. 28-29).[2] He therefore recommended that the objections be overruled (Pet. App. 41). The Board issued a Decision and Certification of Representative, rejecting petitioner's exceptions to the Regional Direc-

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[1] There were two challenged ballots (Pet. App. 41). The challenges were not resolved because the number of disputed ballots was insufficient to affect the outcome of the election (Pet. App. 24 n. 2).

[2] "R" references are to the volume of documents captioned "Vol. I, Pleadings" filed in the court of appeals. A copy has been lodged with the clerk of this Court.

tor's Report as well as its contention that factual issues had been raised that required the holding of an evidentiary hearing (Pet. App. 41).

2. Thereafter, on charges brought by the Union that petitioner had refused to bargain, an unfair labor practice complaint was issued (Pet. App. 39-40). On motion for summary judgment, the Board found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. App. 46-47). In so holding, the Board rejected petitioner's contention that the Union's offer to waive initiation fees applied only to those employees who joined the Union prior to the election and therefore violated the rule of *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270 (1970).[3] The Board explained (Pet. App. 43):

> [W]e find the Union's conduct to be wholly consistent with the Supreme Court's teaching in

[3] *Savair, supra,* was handed down after the Board's Decision and Certification of Representative. In opposing the motion for summary judgment in the subsequent unfair labor practice proceeding, petitioner urged that the *Savair* decision required an evidentiary hearing based on an affidavit from an employee, Charles Finney (Pet. 5 n. 3), stating that he had understood the Union's offer to mean that the Union would not charge an initiation fee to any employee joining before the election. The Board rejected the affidavit, citing *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 162 (1941). The Board noted that the affidavit did not contain "newly discovered or previously unavailable" information. The Board also pointed out that petitioner should have presented the affidavits in the representation proceeding where the effect on the election of the fee waiver was clearly in issue (Pet. App. 44 n. 7).

> *Savair*, for here, unlike *Savair*, there was not a waiver limited to those who signed a card for, or otherwise supported, the Union before the election. In this case, the Union's statement in no way implied that eligible voters would have to pay dues or initiation fees unless they joined the Union prior to the election. Rather, the employees would have received a waiver of dues and initiation fees even though they had become members of the Union after the election. Thus, the waiver of dues and initiation fees here was unconnected with support for the Union before the election, unrelated to a vote in the election, and without distinction between joining the Union before or after the election. Our colleagues, apparently see some vice in the Union's use of "members" as those for whom the waiver would be effective. But those becoming members are the only ones on whom an initiation fee is imposed, and we see nothing in the shorthand description of these as "members" to tie the waiver to preelection support, any more than we find in the remaining language of the waiver.

3. The court of appeals enforced the Board's bargaining order (Pet. App. 23). The court agreed with the Board that the phrase in the Union's letter—"any member presently working in the plant"—referred to incoming members and not to those who were already members or who would become members prior to the election, and concluded that "the Union offer to waive initiation fees was neither improper nor impermissibly ambiguous" (Pet. App. 27). The court also rejected petitioner's argument concerning the early closing of the polls. The court noted that the

only potential voter affected by the early closing was "clearly * * * not eligible" and therefore "no prejudice [resulted] to the Company" (Pet. App. 28). Concerning petitioner's assertion that it was improperly denied an evidentiary hearing, the court stated (Pet. App. 30-31):

> The respondent Company came forward with no substantial offer of proof to contradict the Regional Director's findings. The only evidence offered by the Company was an affidavit by an employee bearing on the *Savair* issue. This affidavit was belatedly presented for the first time as part of the Company's motion for summary judgment in the present unfair labor practice proceeding, although its relevancy to the earlier representation proceeding was clear. On this paltry showing, the Company failed to meet its burden of raising substantial and material issues. [Footnote omitted.]

ARGUMENT

1. In *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973), this Court held that a union impermissibly interfered with the free choice of employees in a representation election by conditioning waiver of initiation fees upon preelection support of the union. The Court recognized, however, that a union has a legitimate interest in waiving its usual initiation fee when such waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election" (*id.* at 274 n.4). The courts of appeals uniformly

have held that unconditional offers to waive fees for employees currently in the workforce are not improper inducements under *Savair* and therefore do not interfere with employee free choice in representation elections.[4]

Petitioner does not dispute this principle. Rather, it contends that the Board, upheld by the court of appeals, improperly interpreted the Union's waiver offer as being available to all incoming members (Pet. 13-16). Petitioner's argument involves only the application of settled principles to the facts of this particular case and does not warrant further review by this Court.[5]

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[4] See *e.g.*, *National Labor Relations Board* v. *Aaron Bros. Corp.*, 563 F.2d 409, 412-413 (9th Cir. 1973); *National Labor Relations Board* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (8th Cir.), cert. denied, 423 U.S. 827 (1975); *Altman Camera Co., Inc.* v. *National Labor Relations Board*, 511 F.2d 319, 322 (7th Cir. 1975); *National Labor Relations Board* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-1313 (6th Cir. 1975); *Thrift Drug* v. *National Labor Relations Board*, 521 F.2d 243, 244 (5th Cir.), cert. denied, 425 U.S. 911 (1975); *National Labor Relations Board* v. *Stone & Thomas*, 502 F.2d 957, 958 (4th Cir. 1974); *National Labor Relations Board* v. *Durkirk Motor Inn, Inc.*, 524 F.2d 663, 665 (2d Cir. 1975).

[5] The Board's factual findings are " 'entitled to the greatest deference' " in recognition of its special competence in dealing with labor problems (*American Broadcasting Companies, Inc.* v. *Writers Guild of America*, No. 76-1121 (June 21, 1978), slip op. 21), and the question whether there is substantial evidence to support the Board's findings is a question for the court of appeals, unless the substantial evidence standard has been "grossly misapplied" (*Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152 (June 22, 1978), slip op. 23).

In any event, the Board properly found that the waiver offer was not limited to those employees who joined the Union prior to the election and that the offer was not ambiguous. *Inland Shoe Mfg. Co.*, 211 N.L.R.B. 724 (1974) (Pet. 14-15), does not support petitioner's contrary assertion. There is a clear difference between the limited offer to "charter members" involved in that case and the open offer to "any member presently working in this plant" involved here. While "charter members" may well be understood to refer to those joining the Union prior to the election because it connotes early membership, the term "member," as used here, did not suggest that eligibility for the waiver depended on preelection adherence to the Union. The Board's interpretation plainly did not constitute an abuse of discretion [6] and the court of appeals properly refused to disturb it. *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946).[7]

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[6] The Board "may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven." Such inferences, based on the Board's "appreciation of the complexities of the subject [matter] entrusted to [its] administration," are entitled to considerable deference. *American Broadcasting Companies, Inc.* v. *Writers Guild of America, supra*, slip op. 20-21.

[7] Petitioner asserts (Pet. 14-15) that the Finney affidavit supports its interpretation of the Union waiver offer. The Board, upheld by the court of appeals, properly rejected the offer of the affidavit as being untimely (Pet. App. 30-31). In any event, the affidavit merely presented Finney's subjective view of the substance of the offer. The propriety of the Union's offer, however, turns on the objective evidence of what it said in its communications to the employees, not on one employee's subjective understanding of what the Union meant. Cf. *National Labor Relations Board* v. *Gissell Packing Co.*, 395 U.S. 575, 608 (1969).

Nor did the court err in upholding the Board's refusal to set aside the election on the ground that the early closing of the polls prevented a potential voter from casting a ballot. Petitioner does not dispute the Board's finding, upheld by the court, that the potential voter was ineligible. Its argument boils down to the proposition that even though no prejudice resulted, the election should be set aside because the polls were closed ahead of schedule. The court below properly rejected this argument, and petitioner has cited no contrary authority.[8]

2. Petitioner's broad claim (Pet. 17-19) that the Board's procedure for investigating and resolving election objections "defies fundamental due process, justice, and fairness" amounts to a complaint that the Board improperly refused to permit it to relitigate the initiation fee question in the unfair labor practice proceeding and improperly denied its request for an evidentiary hearing on its election objections. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a party is not entitled to relitigate in an unfair labor practice proceeding any question that

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[8] The cases relied on by petitioner (Pet. 17) are not relevant. Those cases involved challenges to the inclusion or exclusion of ballots or to the composition of bargaining units that could have affected the outcome of the elections in question or the bargaining obligations of the parties.

was or could have been raised in the prior representation proceeding. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 162 (1941); 29 C.F.R. 102.67(f). As the court below observed, the only evidence that petitioner sought to introduce at the unfair labor practice proceeding (the Finney affidavit) was available at the time petitioner filed its post-election objections and "its relevancy to the earlier representation proceeding was clear" (Pet. App. 30-31).

Similarly there is no merit to petitioner's contention that it was entitled to an evidentiary hearing on its post-election objections.[9] Section 102.69(d) of the Board's Rules and Regulations, 29 C.F.R. 102.69(d), provides for a hearing when an administrative investigation reveals that "substantial and material factual issues exist." It is well settled that this qualified right to a hearing satisfies statutory and constitutional requirements.[10] Here, as the court of appeals held, "[t]he respondent company came forward with no substantial offer of proof to contradict the Regional Director's findings" (Pet. App. 30), and there

[9] Petitioner's assertion (Pet. 9) that, had there been an evidentiary hearing in the unfair labor practice proceeding, it would have been entitled to free access to materials in the Board's investigatory files is mistaken. See *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911 (June 15, 1978).

[10] See, *e.g.*, *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F.2d 26, 32-33 (C.A. 5); *National Labor Relations Board* v. *Hevi-Duty Electric Co.*, 410 F.2d 757, 758 (4th Cir.), cert. denied, 396 U.S. 903 (1969).

was thus no basis for concluding that the Board "abused its discretion" in declining to hold an evidentiary hearing. See *National Labor Relations Board* v. *Griffith Oldsmobile, Inc.*, 455 F.2d 867, 868-869 (8th Cir. 1972); *National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 178-179 (7th Cir.), cert. denied, 389 U.S. 958 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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